



Malek v Attorney General of the Republic of South Sudan & another; Bank of Sudan (Interested Party) (Miscellaneous Civil Application E127 of 2021) [2022] KEHC 15950 (KLR) (Commercial and Tax) (29 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15950 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E127 OF 2021
JK SERGON, J
NOVEMBER 29, 2022**

BETWEEN

JUSTICE MALEK MATHIANG MALEK APPLICANT

AND

**ATTORNEY GENERAL OF THE REPUBLIC OF SOUTH
SUDAN 1ST RESPONDENT**

NATIONAL COMMERCIAL BANK OF AFRICA, KENYA 2ND RESPONDENT

AND

BANK OF SUDAN INTERESTED PARTY

RULING

1. Pending before me for determination is the notice of motion dated March 18, 2021 brought by the applicant/decree holder and supported by the grounds laid out on its face and the facts stated in the affidavit sworn by advocate Gilbert Josiah Mungu, seeking the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That the judgment of the court of July 24, 2020, the ruling of the taxing officer of December 1, 2020 and certificate of costs dated December 1, 2020 and the decree thereof given under be and is hereby adopted as this honourable court’s order and decree.



- iv. That the 1st respondent do furnish a full and complete inventory of all monies held in all and any bank within and outside the jurisdiction of this honourable court, and assets and/or properties owned by the 1st respondent within three (3) days of service of the application.
 - v. Spent.
 - vi. That the costs of the application being usd 21,000 be awarded against the respondent together with interest thereon at such rate and for such period as this honourable court may deem fit.
 - vii. Spent.
 - viii. Any such further relief as this honourable court may deem fit in the interest of justice.
2. The 1st respondent put in the grounds of opposition dated August 12, 2022 to oppose the motion, arguing that:
 - a. An advocate can swear an affidavit on behalf of his/her client on uncontested facts that do not require production of evidence. The application is thus fatally defective.
 - b. An order from the East African Court of Justice dated February 2, 2021 directed towards the High Court of Kenya, Milimani law courts directed that the High Court of Kenya deal with the execution proceedings herein.
 - c. The application is frivolous, vexatious, an abuse of court process and a total waste of the court's precious time.
 - d. The application dated March 10, 2022 ought to be dismissed with costs.
 3. The 2nd respondent/garnishee ("the garnishee") put in the replying affidavit sworn by its senior legal officer, Stephen Atenya, on February 18, 2022.
 4. The interested party put in the notice of preliminary objection dated March 10, 2022 and raised eight (8) grounds of objection essentially challenging the jurisdiction of this court to entertain the motion under article 38(3) and 44 of the [Treaty establishing the East African Community](#); and further challenging the competency of the supporting affidavit to the motion.
 5. The interested party also put in the replying affidavit sworn by Yeni Samuel Costa on March 11, 2022.
 6. The motion was dispensed with through written submissions.
 7. I have considered the grounds laid out on the face of the motion, the facts deponed in the affidavits supporting and resisting the motion, the grounds of opposition, the notice of preliminary objection, and the rival written submissions and authorities relied upon.
 8. I will first address the issues raised in the preliminary objection.
 9. The first preliminary issue touches on whether this court has jurisdiction to entertain the instant Motion.
 10. The interested party argues that it is a sovereign entity which enjoys immunity and hence this court cannot issue any orders against it.
 11. Upon my consideration of the above arguments, it is apparent that the question as to whether it is covered by immunity is one which would require this court to delve into the facts and further material, and would therefore not constitute a preliminary issue on a pure point of law. I am therefore hesitant to make such a declaration at this stage.



12. The second preliminary issue touches on whether the instant motion is competently before this court, pursuant to the proviso of article 38(3) and 44 of the [Treaty establishing the East African Community](#).
13. Article 38(3) which provides for acceptance of judgments of the court (The East African Court of Justice) and reads as follows:

“A partner state or the council shall take, without delay, the measures required to implement a judgment of the court.”
14. Article 44 which caters for the execution of judgments stipulates that:

“The execution of a judgment of the court which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the partner state in which execution is to take place. The order for execution shall be appended to the judgment of the court which shall require only the verification of the authenticity of the judgment by the registrar whereupon, the party in whose favour execution is to take place, may proceed to execute the judgment.”
15. From my reading and understanding of the above provisions, I have not come across anything to indicate that the instant Motion is fatally defective and incompetently before this court. It is apparent from the foregoing provisions that this court is permitted to entertain the instant Motion.
16. The final major preliminary issue for determination and which was also raised in the grounds of opposition by the 1st respondent touches on competency of the supporting affidavit to the Motion.
17. Both the interested party and the 1st respondent have challenged the supporting affidavit for having been sworn by the applicant’s advocate.
18. However, upon my consideration of the record, I observed that the advocate tendered credible evidence to support the averments made and I do not find anything precluding him from swearing the affidavit on behalf of his client.
19. Consequently, the notice of preliminary objection is hereby dismissed with no order on costs.
20. On to the merits of the Motion, it remains unclear whether prayer (iv) which was sought in the interim, was complied with. Suffice it to say that none of the parties addressed me on it, which leads me to find that the prayer is now spent.
21. It is clear that the substantive order sought in the instant motion is primarily for the adoption of the judgment delivered by the court.
22. In his supporting affidavit, advocate Gilbert Josiah Mungu states that on or about September 13, 2017 the applicant instituted a suit against the 1st respondent namely Reference No 9 of 2017 and which suit was successful.
23. The advocate further stated that the applicant thereafter filed a bill of costs and which bill was taxed at the sum of usd 212,290 and a certificate of costs issued.
24. It is the assertion by the advocate that efforts to execute the judgment/decrees have been unsuccessful and hence why a notice of execution was issued by the Registrar of the court to the High Court in Kenya-Milimani law courts, for purposes of execution of the judgment and recovery of the costs of the suit.



25. From my study of the record, I observed that the applicant tendered credible evidence to support the averments made in respect to the existence of the judgment and ruling on taxation delivered by the court, and as to the matter being referred to the High Court in Kenya.
26. In the absence of any contrary evidence and/or indication that the decision has been challenged, I am satisfied that it would be a proper exercise of my discretion to have both the judgment and ruling on taxation adopted as an order of this court.
27. The second facet of the motion concerns itself with the prayer for costs in the sum of usd 21,000 in respect to the motion, and which prayer has been vehemently opposed by the 1st respondent and the interested party.
28. Upon my study of the record, it remains unclear how the above sum was arrived at. Suffice it to say that, the law according to section 27(1) of the *Act* is clear that costs follow the event unless reasonable cause has been shown to order otherwise and such costs are to be assessed accordingly.
29. In view of the foregoing circumstances, I am of the view that should the motion succeed, the applicant may be entitled to an award of costs but within the discretion of the court.
30. I also wish to point out that the applicant sought for another separate prayer for a Mareva injunction; however, this prayer was only sought in the interim and is now spent.
31. In the circumstances, I will allow the motion dated March 18, 2021 in terms of orders (iii).
32. Consequently:
 - i. The judgment of the East African Court of Justice of July 24, 2020, the ruling of the taxing officer of December 1, 2020 and certificate of costs dated December 1, 2020 and the decree thereof given under be and is hereby adopted as this honourable court's order and decree.
 - ii. The applicant shall also have costs of the motion dated March 18, 2021.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2022.

J.K. SERGON

JUDGE

In the presence of:

..... for the Applicant/Decree Holder

..... for the 1st Respondent/Debtor

..... for the 2nd Respondent/Garnishee

..... for the Interested Party

